

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1077

To be argued by
BARRY A. BOHRER

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

DOCKET No. 77-1077

UNITED STATES OF AMERICA,

Appellee,

against

LEANDRO KATZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT LEANDRO KATZ

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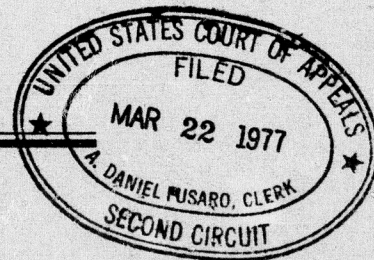


TABLE OF CONTENTS

Preliminary Statement.....	1
Question Presented.....	2
Statement of the Case.....	2
The Government's Case.....	2
The Defendant's Case.....	6
ARGUMENT: THE DISTRICT COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF ENTRAPMENT TO THE JURY.....	14
A. There was evidence of direct governmental inducement.....	15
B. The District Court improperly refused to instruct the jury on Katz's "amaneunsis theory" of entrapment.....	28
Conclusion.....	32

TABLE OF CASES

	<u>Page</u>
<u>Sansone v. United States</u> , 380 U.S. 343 (1965) . .	19
<u>Sherman v. United States</u> , 356 U.S. 369, 374 . . . (1958)	26, 27
<u>Sorrels v. United States</u> , 287 U.S. 435 (1932) . .	25
<u>United States v. Alfonso-Perez</u> , 535 F.2d 1362 (2d Cir. 1976)	32
<u>United States v. Anglada</u> , 524 F.2d 296 (2d Cir. 1975)	24, 25, 28
<u>United States v. Berger</u> , 433 F.2d 680, 684 (2d Cir. 1970)	27
<u>United States v. Braver</u> , 450 F.2d 799 (2d Cir. 1971)	17
<u>United States v. Brown</u> , ___ F.2d, ___ slip op. 5969, 5972 n.4 (2d Cir. November 8, 1976) . .	26
<u>United States v. Dehar</u> , 388 F.2d 430, 433 (2d Cir. 1968)	17, 21, 24, 25, 58
<u>United States v. Greenberg</u> , 444 F.2d 369 (2d Cir. 1971)	23
<u>United States v. Henry</u> , 417 F. 267, 269 (2d Cir. 1969)	16, 22
<u>United States v. Licursi</u> , 525 F.2d 1164 (2d Cir. 1975)	23
<u>United States v. McMillan</u> , 368 F.2d 810 (2d Cir. 1966)	22
<u>United States v. Miley</u> , 513 F.2d 1191 (2d Cir. 1975)	23
<u>United States v. Nieves</u> , 451 F.2d 836 (2d Cir. 1971)	23

	<u>Page</u>
<u>United States v. Riley</u> , 363 F.2d 955 (2d Cir. 1966)	15, 16, 21, 24, 27
<u>United States v. Rosner</u> , 485 F.2d 1213 (2d Cir. 1973)	28, 29
<u>United States v. Sherman</u> , 200 F.2d 880 (2d Cir. 1952)	15, 16
<u>United States v. Swiderski</u> , 539 F.2d 854 (2d Cir. 1976)	24
<u>United States v. Swiderski</u> , _____ F.2d _____, 1627 (2d Cir. February 1, 1977).	18
<u>United States v. Viviano</u> , 437 F.2d 295 (2d Cir. 1971)	22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
-against-	:	Docket No.: 77-1077
LEANDRO KATZ,	:	
Defendant-Appellant.	:	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

Leandro Katz appeals from a judgment of conviction entered on January 28, 1977 in the United States District Court for the Southern District of New York (Hon. Charles E. Stewart, Jr.), on an indictment (75 Cr. 457) charging him, along with Stephen Wilkinson*,

* Wilkinson pleaded guilty to one count charging him with conspiracy to distribute narcotics.

with two counts of distribution and possession with intent to distribute two ounces of cocaine. Katz was found guilty after a jury trial, on both counts. On January 28, 1977, Katz was sentenced to a term of one year's probation.*

Question Presented

Did the District Court err in refusing to submit to the jury the defendant's requested charge on the issue of entrapment?

Statement of the Case

The Government's Case

The Government's evidence as given primarily by Thomas Fekete, an undercover agent of the federal Drug Enforcement Administration.

Agent Fekete testified that, in June, 1974, he was engaged in an investigation of one Stephen Wilkinson, whose acquaintance he had made by a series of introductions. Fekete was first introduced to Wilkinson at the residence of

* Katz, a native of Argentina and permanent resident of the United States since 1965, faces the possibility of deportation as a result of this conviction.

Joseph Rollo, another defendant who did not proceed to trial, in June of 1974. (Tr. 19.)* Wilkinson described himself as being capable of supplying large quantities of cocaine, primarily from outside the United States (20).

At their first meeting, it was agreed that Fekete would purchase approximately eleven kilograms from Wilkinson (47). Wilkinson stated that his wife's family had connections in the cocaine trade in Lima, Peru and that he would be travelling to Lima in order to obtain the eleven kilograms (56). In spite of Wilkinson's belief that he was a bona fide customer, Fekete sought to persuade Wilkinson that money was available for the purchase of eleven kilograms of cocaine (47).

Fekete made arrangements for \$70,000 to be placed in a safe deposit box at the Franklin National Bank. In July, 1974, at Fekete's suggestion, and without notice to Wilkinson, Fekete invited Wilkinson to see the money (50). After Fekete showed Wilkinson the \$70,000, Wilkinson displayed

* References to the trial transcript shall hereinafter be designated by the page number appearing within parentheses.

his passport. Wilkinson revealed that he could not afford a plane ticket to Lima, Peru, but that, as soon as he could, he would depart for Peru (53).

At their first meeting, Wilkinson had stated that he would introduce Fekete to several small scale purchasers of cocaine in the United States (20). Pursuing this lead, on August 7, 1974, Fekete made a telephone call to Wilkinson at approximately 5:30 P.M. The two agreed to meet at the Broome Street Bar in lower Manhattan where they would discuss the possibility of Fekete purchasing cocaine later that evening (22).

At the bar, they agreed that Fekete would purchase two ounces of cocaine that evening at a price of \$3,600 (23). At approximately 6:15, the two left the bar and entered a car; Wilkinson instructed Fekete to drive to 25 East 4th Street in Manhattan. Once arrived at their destination, Appellant Katz answered the door and was introduced to Fekete by Wilkinson as "Leo". Katz, Wilkinson, and Fekete proceeded to Katz's eighth floor loft.

Inside the loft, the three proceeded to a

photographic darkroom, where Katz produced a clear plastic bag containing cocaine (24). Katz stated that he had only one ounce of cocaine, but agreed with Fekete that the other ounce could be transferred later that evening (25). After Katz and Fekete weighed the cocaine, Fekete handed \$1,800 to Wilkinson who then huddled with Katz (25). Wilkinson and Fekete departed.

Four hours later, at approximately 10:15, Fekete spoke with Wilkinson on the telephone. Wilkinson stated that the transaction would proceed in the same manner as the previous one. They met at the corner of Broome Street and West Broadway, and once again drove to 25 East 4th Street. There, Katz answered the door and the three proceeded to the same darkroom in which they had been earlier that evening. Katz produced a bag and stated that it contained an ounce of cocaine identical to the ounce previously purchased by Fekete (28). Fekete handed \$1,800 to Wilkinson, Katz gave the ounce of cocaine to Fekete, and Fekete and Wilkinson departed.

Wilkinson's attention was redirected to Lima, Peru, and the eleven kilogram cocaine transaction he had arranged with Fekete. On or about August 8, 1974, the day following the transactions at Katz's residence, Wilkinson

fulfilled his promise to Fekete by purchasing a plane ticket to Lima, Peru (54). Soon thereafter, Fekete followed Wilkinson to an airport and watched him board a plane to Lima, Peru, to complete the arrangements for the eleven kilogram cocaine purchase. (35). Wilkinson subsequently returned from Peru, although the results of his labor were not brought out at trial. At the time of trial, Wilkinson could not be located.

Over one year later, on September 24, 1975, Fekete arrested Katz in his apartment, pursuant to a warrant for one John Doe "Leo" (30). A search of Katz revealed a minute amount (.26 grams) of cocaine.

The Defendant's Case

While not disputing the actual transactions, Katz gave a wholly different version of events and their origins.

Born in Buenos Aires, Argentina, Katz, a first offender with no prior criminal involvement, attended Buenos Aires University, where he received a degree in English literature. He became co-editor of a literary magazine called "Airon" (107). It was in this capacity that Katz met Alma

Perry, a student at the University. The two became close friends and had a love affair in 1959 (124). Soon thereafter, they separated; but were to meet again, years later, in New York City.

Katz came to the United States in 1965, initially as a visitor. He immediately applied to become a permanent resident; this application was granted in 1965. Katz married in New York in 1966. He became a father in 1967, but separated from his wife in 1970 (113). During the period of his marriage, Katz met Alma once again. She was then married to Stephen Wilkinson. Subsequently, the Wilkinsons took up residence in Europe. Upon their return in 1973, Katz again met them in New York City (125). In 1973 and 1974, Katz saw the Wilkinsons approximately two or three times a month. He saw Alma more often than he saw Stephen Wilkinson.

Katz testified that he used cocaine for the first time in 1972. He stated that he used cocaine very infrequently from 1972 until August of 1974, and only at social gatherings (129). He never brought cocaine to any of the social gatherings, but, sometimes, in visits with Alma, he would bring small quantities. On several occasions, Katz had obtained a "spoon"

(apparently the smallest denomination available to a user) of cocaine, sometimes in return for his professional services as a photographer (130; 186). Prior to August, 1974, Katz never had in his possession any amount of cocaine greater than one "spoon", nor had he ever sold cocaine (130).

In the early part of August, 1974, Katz began to receive phone calls from Stephen Wilkinson, which were followed up by a visit to Katz's loft, where he asked if Katz could obtain two ounces of cocaine for him. Katz told Wilkinson that he could not, but Wilkinson persisted, telling Katz that he had a customer ready to purchase two ounces. Katz informed Wilkinson that he did not know anyone who could obtain cocaine, and Wilkinson thereupon departed (133). The next day, Alma*, apparently acting in Wilkinson's behalf, visited Katz, asking if there was anything he could do to obtain two ounces of cocaine for Wilkinson; Katz replied that he could do nothing (140).

The following day, Alma called Katz to inquire about their discussion of the day before; Katz repeated his

* Despite efforts to locate her, Alma, like Wilkinson, could not be found, and was not available to testify at trial (199).

disinclination (141). Alma visited Katz a day later, again asking him to assist Wilkinson in obtaining two ounces of cocaine (144). While Alma was present, Wilkinson contacted Katz by telephone and spoke with her. Katz overheard them arguing. (145). After Alma left, Wilkinson once again called and once again asked if Katz had been able to obtain the requested cocaine. Katz ended the inquiry by abruptly hanging up the phone (147). This was the sixth contact from either of the Wilkinsons and the sixth refusal by Katz.

At 5 o'clock the next morning, Katz received yet another phone call from Alma. She told him that she was in a phone booth on a street corner with her two children under her arms. She claimed to have been stabbed in the arm by her husband, Wilkinson (147). Katz offered assistance, but Alma stated that she would stay with a girlfriend (148).

The next day, Alma and Katz met in a coffee shop. Alma again asked Katz about obtaining two ounces of cocaine, explaining that it would resolve her marital problems by allowing Wilkinson, a sometime musician, to travel to California to play in a band (151). Katz, refusing to allow himself to become embroiled in a marital dispute, rejected for the seventh time the proposition that he obtain cocaine

for Wilkinson (151). Thereupon, an agitated Alma told Katz that if he couldn't obtain the cocaine, then she would do so (152).

That same afternoon, August 5, 1974, Alma visited Katz at home. She informed him that she had been able to secure some cocaine, but asked if Katz would allow his house to be used as a depository so that Wilkinson could pick it up there (153). She told Katz that someone whom he had seen before would deliver the cocaine. Katz, under the impression that Alma might be suffering a nervous breakdown, finally succumbed to her begging and agreed to act as a "straw man" (203-204). Later that day, a person named "Tim" delivered a package and told Katz that he (Katz) should receive a total of \$3,000 for the merchandise, out of which he might retain \$200 (158).

Katz was under the impression that only his apartment would be used for a transaction, and that he personally would not be involved (158). That evening, Wilkinson called and asked Katz if he had the cocaine. Apparently unsure of his role in an otherwise unclear situation, Katz decided to buy some time in which to think

by lying to Wilkinson -- telling him "no" (159).

The following day, August 6th, Wilkinson called again and Katz told him that he did not have the cocaine. After this, Katz stayed out of his house, allowing a day to pass (159). On August 7th, Wilkinson called Katz who finally informed him that the cocaine was available (161). At approximately 6 o'clock that evening Wilkinson arrived at Katz' home.

Katz was shocked to discover that Wilkinson had brought another person, introduced as "Tom" (Agent Fekete), along with him. Katz asked Wilkinson, "What is this person doing here and why didn't you tell me you were coming with someone else? You said you were going to come by yourself." (162) Wilkinson made an effort to pacify Katz, who remained unpersuaded.

Katz sought to tell Wilkinson to leave his home, but "Tom" would not allow them to speak privately (163). Instead, Fekete asked Katz "What's going on?" Katz replied, "I don't have it. I don't want to go through this. I don't have," Fekete then said, "Come on, man, you must have it." (166).

Katz again expressed his bewilderment and reluctance to Wilkinson, to which Fekete responded, "Well come on, let's get it over with. You have it here, right? I have the money here. Let's do it." (167).*

Subsequently, Katz produced one envelope containing one ounce of cocaine from a larger envelope which contained yet another ounce (168). Fekete examined the cocaine and asked Katz, "Is this rocks or flakes?" Katz did not know what Fekete was talking about, responding mechanically, "It's rocks and flakes." (170)

Fekete weighed the cocaine and asked where the other ounce was. Katz, still unsure of the situation, said that he did not have it. Fekete asked if Katz would be able to get the second one; Katz said that he didn't know. Fekete handed money to Wilkinson who kept some for himself and passed the rest to Katz. Katz was left with \$1,500, of which he was supposed to keep \$100 (172). Fekete and Wilkinson departed.

Later that evening, Katz received a telephone call from Wilkinson who inquired about the availability of the

* Fekete denied that this conversation took place (237-240).

second ounce. Katz told him it was available and they agreed that Wilkinson would return. Shortly thereafter, Fekete and Wilkinson arrived at Katz's home. The transaction proceeded exactly as it had earlier in the evening (174). Again, Fekete gave Wilkinson money and again Katz was left with \$1,500. Fekete and Wilkinson departed.

The next day Katz received a telephone call from Tim, the source of the cocaine. In response to Tim's inquiry, Katz told him that he had the money and that Tim could pick it up. Tim collected \$2,800 from Katz.

Shortly after the transactions, Katz collapsed from the tension caused by his situation. He developed blisters on his wrists, knees, and legs and sought medical treatment at the emergency room of the Beth Israel Hospital (182).

Almost fourteen months later, on September 24, 1975, Katz was arrested and found to be in possession of a small amount of cocaine which had been given to him as a gift (186).

ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO
SUBMIT THE ISSUE OF ENTRAPMENT TO THE JURY.

Asserting that he was induced to commit the offenses charged by the activities of Fekete, a Government agent, both by Fekete's direct contact as well as his utilization of Wilkinson and Alma to pressure him, Katz requested the District Court to charge the jury on entrapment.*

The District Court refused to submit the issue of entrapment to the jury, also precluding counsel from arguing it to the jury, holding that:

...Mr. Katz testified that after the agent and Stephen Wilkinson came to his apartment to consummate the cocaine sales, the agent, in response to expressions of reluctance made by Mr. Katz, urged that the deal go through.

We note that Mr. Fekete denies that he made the statements alleged by Mr. Katz. But even assuming that Mr. Katz' testimony is correct, I do not think that this conduct on the part of the agent in the middle of the transaction, after Mr. Katz already come into the possession of the amount of cocaine for which he knew Wilkinson had a buyer, is sufficient evidence of government instigation or

* The complete Request to Charge is set forth in the Appendix at

inducement.

I find this particularly in light of the fact that later in the same day, in response to a telephone call from Stephen Wilkinson, not Agent Fekete, Mr. Katz repeated the transaction with the two men without, it appears, the verbal interchanges which accompanied the first exchanges. (275-276).

The Court below also rejected what counsel characterized as the "amanuensis theory of entrapment" -- that the Government was responsible for the acts of its collaborators, Wilkinson and Alma. The Court held that there was no evidence that either of the Wilkinsons were paid agents or informers of the Government.*

A. There was evidence of direct governmental inducement.

This Court's seminal decision concerning submission of entrapment to the jury is United States v. Riley, 363 F.2d 955 (2d Cir. 1966), in which Judge Friendly reaffirmed this Court's adherence to the two-element approach previously established by Judge Learned Hand in United States v. Sherman, 200 F.2d 880 (2d Cir. 1952), in which he stated:

Two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment;

* The district court's findings and holding with respect to the entrapment charge are set forth in the Appendix at .

(2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence [sic.]. On the first question the accused has the burden; on the second the prosecution has it.

Id., 200 F.2d at 882-3.

Recognizing that Judge Hand's bifurcated entrapment test did not resolve the question of what quantum of proof was necessary to entitle a defendant to argue entrapment to the jury, Riley set forth what elements a defendant must demonstrate to merit entitlement to an entrapment charge. Once the Government's inducement or initiation of the crime was put in issue, the Court was required to charge on entrapment unless the accused's propensity was established by "uncontradicted proof." United States v. Riley, supra, 363 F.2d at 959.

Adverting to Judge Hand's definition of "inducement" (United States v. Sherman, supra, 200 F.2d at 883), Riley noted that it included "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." Id.

In United States v. Henry, 417 F.2d 267, 269 (2d Cir. 1969), this Court held that the defendant's burden

in showing "inducement" is "relatively slight." In fact, so little evidence is required to satisfy the defendant's burden of proof, that production of "some evidence" of Government inducement almost always satisfies it. United States v. Braver, 450 F.2d 799 (2d Cir. 1971). Moreover, in considering whether the evidence is sufficient to take the issue of entrapment to the jury, the testimony must be viewed in a light most favorable to the defendant, United States v. Dehar, 388 F.2d 430, 433 (2d Cir. 1968).

In the present case, crediting the testimony most favorable to Katz, there was clearly evidence of some governmental inducement. Adhering to Judge Hand's definition of "inducement", the jury could reasonably have believed that Agent Fekete solicited, proposed, or suggested the commission of the offense charged. The offense charged here was possession with intent to distribute. The record indicates that, until coaxed and pressured by Fekete, Katz had no intention of distributing the cocaine. Indeed, Katz stated to Wilkinson and Fekete that he did not "want to go through with this." In an attempt to keep Fekete at bay, Katz told him that he did not have the cocaine. Only in response to Agente Fekete's continuous prodding did Katz finally produce it.*

* Had Katz, in fact, declined to consummate the transaction with Fekete, and, instead, returned the cocaine to his original supplier, his liability may have extended only to a misdemeanor violation of 21 U.S.C. 844(a), See United States v. Swiderski, discussed infra, since the requisite intent to distribute was arguably lacking.

In enacting this statutory drug enforcement scheme, Congress drew a sharp distinction between drug offenses of a commercial nature and mere illicit possession of controlled substances. 21 U.S.C. §841 which punishes the manufacture, distribution, or dispensation of controlled substances or the possession of such substances with intent to manufacture, distribute or dispense, provides for a maximum sentence of 15 years' imprisonment, a fine of up to \$25,000, or both, plus a special parole term of at least three years. In contrast, 21 U.S.C. §844(a) provides that simple possession of a controlled substance shall be punished by a sentence of imprisonment for not more than one year for a first offender, a fine of not more than \$5,000, or both. See, United States v. Swiderski, _____ F.2d _____, slip op. 1627 (2d Cir. February 1, 1977).

Nor was this distinction lost on the defendant, the court, or the jury. Katz testified that there was a distinction in his mind between the mere possession of cocaine and selling ounces to another (213). Indeed, counsel for Katz requested that this distinction be presented to the jury, requesting a charge on simple possession, 21 U.S.C. 844(a), as a lesser included offense. The district court noted that

a lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense. Sansone v. United States, 380 U.S. 343 (1965). The court found that Katz had raised sufficient question as to his intent and whether he "knowingly and willfully" distributed or possessed the cocaine with the intent to distribute, "as to mean that there is here 'a disputed factual element which is not required for conviction of the lesser-included offense' of the possession" (277), and thus granted Katz's request to instruct the jury on simple possession. Moreover, the jury, in the course of its deliberations, sent a note to the court seeking a clarification of the lesser charge.

Clearly, then, there was "some evidence" that Agent Fekete broached or suggested the commission of the offense charged. When Fekete entered the eighth floor loft, Katz already was in violation of 21 U.S.C. 844(a), an offense not charged. However, it was not until Fekete coaxed and prodded Katz that any colorable violation of 21 U.S.C. 841 -- the offense charged -- occurred.

But Fekete's inducement, which culminated in his pressuring Katz to make the transfer, had its provenance long before the two met. Katz contended below that the raison d'etre for the instant transactions was Wilkinson's need to obtain money for the purchase of plane tickets to Peru in order to complete an 11 kilogram cocaine deal with Fekete.

Yet, were it not for Fekete, Wilkinson would have had no such need. Were it not for the \$70,000 "carrot" which Fekete dangled in front of Wilkinson, Katz would not have been drawn into this illicit vortex. It was Agent Fekete's idea to show Wilkinson the \$70,000 "flash roll."

Moreover, it was Fekete who called Wilkinson, seeking a narcotics transaction. Wilkinson had made it abundantly clear to Fekete that he needed money for tickets to Peru; the transactions with Katz would provide him with the requisite funds. Indeed, the day following the transactions at Katz's residence, Wilkinson purchased the tickets to Peru - land of the 11 kilogram cocaine deal.

While Fekete's initial machinations shed interesting light on his motivation in making the transaction with Katz

succeed, the coup-de-grace occurred in Katz' loft on August 7, 1974. For even after Katz had been subjected to the constant importunings of Alma and her husband-cohort Wilkinson, he still refused to engage in a narcotics transaction until Fekete insisted upon it.

Thus, viewing the testimony in this context in the light most favorable to Katz, there was clearly "some evidence" of inducement or initiation by Agent Fekete with respect to the offense charged. Accordingly, the District Court could refuse to submit the issue of entrapment to the jury only if "uncontradicted proof" of Katz's propensity was established. United States v. Riley, supra, 363 F.2d at 959. Moreover, as Judge Friendly stated, "the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be." Id., 363 F.2d at 959 (emphasis supplied.; United States v. Dehar, supra, 388 F.2d at 433.

Once the defendant demonstrates inducement, the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which

the defendant is charged; (2) an already-formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged, as evidenced by the accused's ready response to the inducement. United States v. Viviano, 437 F.2d 295 (2d Cir. 1971).

The record in the present case contains no evidence of prior drug selling by Katz or a previously-formed intent to commit the crime. Compare United States v. Henry, supra, (defendant had previously offered to arrange sales of heroin); United States v. McMillan, 368 F.2d 810 (2d Cir. 1966) (prior narcotics sale by defendant who did not testify). Nor was there evidence showing Katz's willingness to commit the crime charged, as evidenced by his repeated refusal of the inducement.

Katz testified that, even upon agreeing, after seven refusals, to allow his house to be used, he himself did not wish to be a party to the transaction. When Wilkinson arrived with Fekete on August 7th, Katz attempted to tell Wilkinson to leave, but Fekete kept in close proximity, thereby precluding Katz from speaking to Wilkinson privately.

Instead, Fekete asked Katz, "What's going on?" Katz replied, "I don't want to go through with this. I don't have it." Fekete shot back, "Come on, man, you must have it." Katz expressed his bewilderment and reluctance to Wilkinson, to which Fekete responded, "Well, come on. let's get it over with. You have it here, right? I have the money here. Let's do it."

In this respect, the present case is unlike the several cases in which this Court upheld the refusal of the trial judge to submit the entrapment issue to the jury. In United States v. Licursi, 525 F.2d 1164 (2d Cir. 1975), the defendant's own testimony demonstrated that he was willing, without persuasion, to commit the offense. Moreover, nowhere in the record was there any evidence that any pressure or persuasion was used by any government representative.

In United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), the defendant was "fully prepared to complete the transaction on the very first occasion." See also United States v. Greenberg, 444 F.2d 369 (2d Cir. 1971) (unchallenged evidence that defendant "grasped at the opportunity"); United States v. Nieves, 451 F.2d 836 (2d Cir. 1971) ("uncontradicted" evidence that defendants were willing to supply cocaine in large quantities and of excellent quality).

On the contrary, this case is similar to United States v. Anglada, 524 F.2d 296 (2d Cir. 1975); United States v. Riley, supra; United States v. Dehar, supra; and United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976), where this Court reversed for failure to submit the entrapment issue to the jury.

While the Government sought to establish Katz's propensity to distribute cocaine or possess it with the intent to distribute by eliciting from Katz the fact that he had used cocaine on at least twenty occasions,* Katz presented evidence which clearly negated his propensity to sell the drug. Assuming Katz's testimony to be true, as the Court must for this limited purpose, he would not have committed the offense charged were it not for the inducement and prodding of Fekete.

In any case, a jury issue was created as to the question of entrapment. It is true that there was conflicting evidence concerning the events and conversations of August 7. But this conflict does not authorize the trial judge to resolve

* Katz, a professor at the School of Visual Arts and an artist whose work has been displayed in exhibitions and museums throughout the world, called fellow members of the art community as character witnesses. Two of these witnesses admitted to the occasional use of cocaine. The Government sought to use these apparent violations of the possession statute as evidence of propensity by Katz and his associates to violate the distribution statute.

the factual issues related to the entrapment defense. "The jury is the body that must decide which of the versions is credible." United States v. Dehar, supra, 388 F.2d at 433.

The District Court, in refusing to submit the issue of entrapment to the jury, pointed to the fact that Katz, after a four-hour hiatus, repeated the transaction with Wilkinson and Fekete, albeit without protestation. To the extent that this evidence implied propensity, the argument was for the Government to make to the jury. The defense of entrapment deals with how the crime "originates." Sorrels v. United States, 287 U.S. 435 (1932).

Moreover, this Court stated in United States v. Anglada, supra, 524 F.2d 299, "There is no iron-clad rule that the reluctance that indicates a lack of propensity must continue throughout the transaction."

The District Court's concern with this apparent four-hour break in the chain of inducement, makes it not improbable that the jury considered this as a factor as well. Had the jury been properly instructed on the entrapment defense, however, the otherwise prejudicial inferences that the jury may

have drawn from the gap would have been ameliorated. The trial judge could have properly instructed the jury that the second transaction was not an independent act "subsequent to the inducement but part of a course of conduct which was the product of the inducement." Sherman v. United States, 356 U.S. 369, 374 (1958), cited with approval in United States v. Brown, _____ F.2d _____, slip op. 5969, 5972 n.4 (2d Cir. November 8, 1976.)

Moreover, the jury was not entirely clear with respect to the issues in need of resolution. Only one hour after it had been sent out to deliberate, it returned a note requesting the definition of the term "willfully" (359). Indeed, the District Court had found that there was a significant factual dispute with respect to "willfulness" to commit the distribution offense, and, therefore, submitted to the jury the lesser included charge of simple possession, 21 U.S.C. 844(a).

The distinction between "willfulness" and "predisposition" may not be perfectly clear, but the jury's attention still was not sufficiently focused on this crucial element. The District Court did not particularly emphasize, as it should have, that, had the jury found that Katz had

adduced some evidence that he was induced by Agent Fekete to commit the offenses charged, then the Government bore the burden of proving beyond a reasonable doubt that the inducement was not the cause of the crime, but, rather, that Katz was ready and willing to commit the offense. See United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970).

Thus, the jury did not have before it the crucial issue of inducement. Nor did it have the benefit of an instruction particularizing the Government's burden of proving beyond a reasonable doubt that Katz was "ready and willing without persuasion", or that he had been "awaiting any propitious opportunity to commit the offense." United States v. Riley, supra, 363 F.2d at 959. Moreover, such an instruction would have put the second transaction in perspective by sensitizing the jury to the possibility that it was the "product of the initial inducement." Sherman v. United States, supra, 356 U.S. at 374.

In United States v. Riley, supra, this Court stressed the value of jury determination of the issue of entrapment:

Cases like this frequently present an issue of credibility as between the agent and the defendant . . . resolution of such an issue

is peculiarly within the jury's province. If it credits the defendant's story in whole or in part, the ensuing question of whether the Government has gone so far in causing the criminal conduct as to take the case outside the definition of the crime and to render punishment an act of injustice, is also highly suitable for determination by a jury representing "the voice of the country. " Id.

There is no escape from this where, as here, seriously contested factual issues are presented. United States v. Anglada, supra; United States v. Dehar, supra. Accordingly, the District Court's refusal to submit the issue to the jury was clear error, warranting reversal.

- B. The District Court improperly refused to instruct the jury on Katz's "amanuensis theory" of entrapment.

In the District Court, Katz asserted that, in addition to being induced directly by the words and actions of Agent Fekete, he was induced by Fekete's utilization of Wilkinson and Alma to apply pressure to convince him to commit the offenses charged.

Relying upon this Court's approval of Judge Bauman's charge in United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), Katz sought to submit to the jury what counsel characterized as

the "amanuensis theory" of entrapment. He argued that "when anyone, including the Government, sets upon a course of conduct designed to create a crime rather than enforce its violation, it is responsible for the logical consequences of its acts, including, but not limited to, the acts of its unwitting collaborators and agents" - in this case Alma and her husband - cohort Wilkinson (258).

The District Court found that there was no evidence that either of the Wilkinsons were agents or informers for the Government, and that there was no support for Katz's contention that Fekete instigated Wilkinson's arrangement of smaller transactions so as to enable Wilkinson to obtain enough money for a plane ticket to further plans for the proposed eleven kilogram sale to Fekete. Thus, the court refused to submit the defendant's theory to the jury.

In United States v. Rosner, supra, the substance of Rosner's defense of entrapment was that he was coerced into committing the offense by Detective Leuci, a Government agent posing as a corrupt police officer, with the assistance of Rosner's co-defendants, Lamattina and DeStefano. Judge Brauman accepted Rosner's "amanuensis" theory and submitted it to the jury:

In this appeal, the defendant asserts that he was induced to violate the law by the

activities of Leuci, a Government agent, both by Leuci's actions in direct discussions with him and also by Leuci's utilization of DeStefano and Lamattina to apply pressure on him.

Id., 485 F.2d at 1222 n. 11.

On appeal, this Court reviewed Judge Bauman's charge on entrapment and stated explicitly - no less than four times - that the instructions given to the jury were "proper" and "appropriate." Id., 485 F.2d at 1221-1222. Such instructions were no less proper or appropriate in the instant case.

Here, the jury reasonably could have believed that Agent Fekete utilized, if not manipulated, Wilkinson to initiate a narcotics transaction and apply pressure on Katz to engage in criminal conduct.

At their first meeting, in June, 1974, Fekete arranged to purchase eleven kilograms of cocaine from Wilkinson. Wilkinson took no apparent action until one month later when Fekete enticed him with a glimpse of \$70,000 in a safe deposit box. It was Fekete who called Wilkinson, seeking a smaller scale narcotics transaction leading Wilkinson to unleash the blitzkrieg of persuasion with Alma as the ultimate tactical force.

Katz had known the Wilkinsons for years, but it was not until Fekete's appearance that he was drawn into their web of criminality. Indeed, the beginning and end of the crimes charged coincided exactly with Fekete's entry into, and withdrawal from, the activities involved in this case. Where, as here, the Government has reaped the rewards of Fekete's surrogates, it should be bound by their tactics in so sowing.

The jury reasonably could have found that Wilkinson and Alma were mere extensions of Fekete or conduits for the inducement, and that the prime motivating factor behind the transactions at Katz's residence was Wilkinson's need for money to purchase a plane ticket to Peru. The jury also could have found that it was not mere coincidence that Wilkinson's profit from the two transactions at Katz's residence was just enough to allow him to purchase the ticket in order to complete the proposed sale with Fekete.

In short, the jury reasonably could have found that the Wilkinsons' inducements were made solely at the initiation and behest of Agent Fekete. There was sufficient basis in the record to permit Katz to argue the "amaneunsis theory" to the jury. Where this is so, there was no reasonable

ground for the District Court to refuse to charge defendant's theory of the case. United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976). Surely, it was critical to Katz to have the District Court charge his theory of the case, and to explain to the jury that this theory, if believed, justified acquittal.

Thus, the District Court precluded the jury from considering a viable defense theory with more than sufficient basis in the record. Such preclusion, on the face of this record, was clear error warranting reversal.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and a new trial ordered.

Dated: New York, New York
March 21, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America

Appellee,

-against-

Leandro Katz,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Frank DiBenedetto, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 40 Bay 37 Street Brooklyn, New York 11214
That on March 22, 1977, he served 2 copies of
on Brief

Ronald L. Garnett

Asst. U.S. Attorney

One St. Andrew Plaza

New York, N.Y. 10007

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

... Frank DiBenedetto ...

Sworn to before me this
22 day of March, 19 77

John V. DiSposito
JOHN V. DIPOSITO
Notary Public, State of New York
No. 50 0932350
Qualified in Nassau County
Commission Expires March 22, 1977